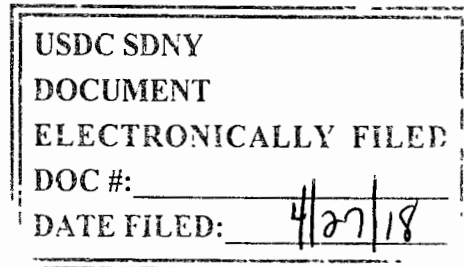


UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK



\_\_\_\_\_  
YEPES, *et al.*,

Plaintiffs,

-against-

No. 18-cv-2038 (CM)

El Tio Pio West Inc., *et al.*,

Defendants.  
\_\_\_\_\_

**DECISION AND ORDER DENYING DEFENDANTS' MOTION TO DISMISS**

McMahon, C.J.:

On March 6, 2018, Plaintiffs Jorge Yepes and Julio Cesar Esquivel Rivera ("Plaintiffs") commenced this action against Defendants – three restaurants and five individuals who own, operate, or control these restaurants – alleging violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, New York Labor Law ("NYLL"), NYLL §§ 190, 650 *et seq.*, and supporting regulations of the New York State Department of Labor.

Plaintiffs principally allege that Defendants failed to pay Plaintiffs minimum, overtime, and spread of hours wages.

On April 16, 2018, Defendants filed a 12(b)(6) motion to dismiss, arguing that Plaintiffs failed to state a claim because: (1) El Tio Pio West Inc. is a small business not covered by the FLSA, (2) neither Carlos Espinoza, Javier Espinoza, El Tio Pio Corp., nor Pio Bagel 8 Inc. employed Plaintiffs, (3) Juan Patricio Espinoza never managed or supervised Plaintiffs, (4) there is no such individual by the name of "Patricia Espinoza," (5) the corporate defendants do not constitute a single enterprise, and (6) the named Plaintiffs and other employees are not similarly situated and thus should be denied certification under 29 U.S.C. § 216(b). Defendants also argue

that if Plaintiffs' FLSA claims are dismissed, this Court should decline to exercise supplemental jurisdiction over Plaintiffs' state law claims.

Counsel for Defendants submitted several declarations and exhibits in support of this motion. Plaintiffs' opposition would have been due on April 30, 2018; however, Plaintiffs' counsel is hereby instructed not to submit opposition papers.

The motion is a premature summary judgment motion and is DENIED.

### **DISCUSSION**

Defendants' counsel chose the wrong procedural mechanism for asserting these arguments.

"Rule 12(b)(6) does not give the district court authority to consider matters outside the pleadings; it simply delineates the procedures which must be followed in testing the legal sufficiency of a complaint." *LaBounty v. Adler*, 933 F.2d 121, 123 (2d Cir. 1991). In deciding a motion to dismiss, this Court may consider the full text of documents that are quoted in or attached to the complaint, or documents that the plaintiff either possessed or knew about and relied upon in bringing the suit. *Rothman v. Gregor*, 220 F.3d 81, 88-89 (2d Cir. 2000) (citing *Cortec Indus. Inc. v. Sum Holding L.P.*, 949 F.2d 42 (2d Cir. 1991), *cert. denied*, 503 U.S. 960 (1992)). *v. Mitchell*, No. 12-CV-601 ER, 2013 WL 2217491, at \*1 (S.D.N.Y. May 20, 2013).

It would be improper to dismiss this complaint without affording Plaintiffs the opportunity to complete discovery. "If the movant wishes to test the factual underpinnings of the complaint, it may submit proper evidence outside the pleadings and move for summary judgment under Rule 56," *LaBounty*, 933 F.2d at 123, according to the schedule set by this Court at the initial pretrial conference.

The discovery schedule for this case is as follows: The parties have until August 31, 2018 to conduct all discovery. The joint pretrial order and all summary judgment motions are due by September 28, 2018. Opposition to summary judgment motions are due by October 19, 2018 and Replies by October 26, 2018.

Discovery disputes in this case will be resolved by Magistrate Judge Sarah Netburn. The first time there is a discovery dispute that counsel cannot resolve on their own, notify my chambers by letter and I will sign an order referring your case to the Magistrate Judge for discovery supervision.

The Clerk of the Court is directed to remove the motion at ECF No. 33 from the Court's list of open motions.

Dated: April 27, 2018



---

Chief Judge

BY ECF TO ALL COUNSEL